

POLICE DEPARTMENT

SERGEANT TAMEIKA GOODE
POLICE OFFICER ANDREW KELLARD

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2017-18266

1. Sergeant Tameika Goode, on or about April 3, 2017, at approximately 1807 hours, while assigned to the 049 PCT and on duty, in the vicinity of Cruger Avenue and Lydig Avenue, Bronx County, was discourteous, in that she spoke discourteously to Oscar Francois without sufficient legal authority by stating in sum and substance: GET THE FUCK OUT OF HERE.
P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT – GENERAL
2. Sergeant Tameika Goode, on or about April 3, 2017, at approximately 1807 hours, while assigned to the 049 PCT and on duty, in the vicinity of Cruger Avenue and Lydig Avenue, Bronx County, abused her authority as a member of the New York City Police Department, in that she threatened to issue a summons to Oscar Francois without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT –
PROHIBITED CONDUCT
3. Sergeant Tameika Goode, on or about April 3, 2017, at approximately 1807 hours, while assigned to the 049 PCT, and on duty in the vicinity of Cruger Avenue and Lydig Avenue, Bronx County, abused her authority as a member of the New York City Police Department, in that she stopped Oscar Francois without sufficient legal authority.
P.G. 212-11, Page 4, Paragraph 16 INVESTIGATIVE ENCOUNTERS

Disciplinary Case No. 2017-18267

1. Police Officer Andrew Kellard, on or about April 3, 2017, at approximately 1807 hours, while assigned to the 049 PCT and on duty, in the vicinity of Cruger Avenue and Lydig Avenue, Bronx County, was discourteous, in that he spoke discourteously to Oscar Francois without sufficient legal authority by stating in sum and substance: GET THE FUCK OUT OF HERE.
P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT – GENERAL
2. Police Officer Andrew Kellard, on or about April 3, 2017, at approximately 1807 hours, while assigned to the 049 PCT and on duty, in the vicinity of Cruger Avenue and Lydig Avenue, Bronx County, wrongfully used force, in that he punched Oscar Francois in the face without police necessity.
P.G. 221-02, Page 2, Prohibition 11 USE OF FORCE

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REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on December 8 and 22, 2020. Respondents, through their respective counsel, both entered pleas of Not Guilty to the subject charges. The Civilian Complaint Review Board (“CCRB”) called Oscar Francois as its witness. CCRB also introduced hearsay statements from **Person A and Person B**. Respondents testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner’s review. Having reviewed all of the evidence in this matter, I find Respondent Goode Not Guilty of Specifications 1, 2 and 3. I further find Respondent Kellard Not Guilty of Specification 1; I find him Guilty of Specification 2. I recommend a penalty of ten suspension days and ten vacation days.

ANALYSIS

The following facts are not in dispute. On April 3, 2017, at approximately 1800 hours, Respondents were engaged in a traffic stop on Cruger Avenue in the Bronx when they were approached by Oscar Francois, a UPS truck driver. Respondents’ respective police vehicles were parked next to each other, effectively blocking traffic from proceeding down Cruger Avenue, a one-way street. After a brief discussion with Respondents, the facts of which are in dispute, Francois walked away and returned to his truck. Once Respondents concluded their traffic stop, Respondent Kellard turned his attention toward Francois and walked back to his delivery truck.

Respondent Kellard and Francois then had a discussion, the facts of which are in dispute. It is undisputed that Francois attempted to close the door of the delivery truck in the midst of his interaction with Respondent Kellard. Respondent Kellard then placed Francois under arrest after

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using force to gain his compliance. At issue are the circumstances of Respondents' response to Francois' approach and the circumstances of his subsequent arrest.

The following is a summary of the trial evidence.

Oscar Francois testified that on April 3, 2017, he was making deliveries as a UPS driver. At approximately 1800 hours, he was in the area of Cruger Avenue, where he encountered considerable traffic; in particular, there were two "cop cars" blocking the flow of traffic down the one-way street (T. 40-41, 45). Francois decided to ask Respondents what was happening and walked from his truck to a space between the police vehicles to address them. He conceded that Respondents were speaking to each other at the time and that he interrupted them. According to Francois, both Respondents both told him, "Get the fuck out of here," and Respondent Kellard added, "Get in your fucking truck." Francois claimed that Respondent Goode also told him that she was a supervisor, and could call Francois' supervisor, as well as give him a ticket (T. 45-47, 131-132, 186-187, 191-193).

Francois replied that he "wouldn't pay for that shit anyway," then walked back to his truck (T. 48-49). While Francois sat in his driver's seat, he observed that Respondent Kellard moved his vehicle forward to permit traffic to move. Respondent Kellard then reversed his vehicle toward Francois' truck before stopping, blocking Francois' truck in again (T. 49-53).

Francois claimed that Respondent Kellard approached his truck and asked for his supervisor's name. He refused to provide the information because he felt that he had done nothing wrong, but Respondent Kellard continued to ask for the information or a driver's license. Francois further claimed that he felt intimidated by Respondent Kellard's actions (T. 54-58). Francois admitted that he told Respondent Kellard that he "wasn't going to give him shit." Respondent Kellard then asked Francois to step out of the vehicle, which he refused to do.

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Francois then tried to “close the door in Respondent Kellard’s face,” which he conceded was “maybe disrespectful.” He testified that his actions were intended to make clear that he would not cooperate because he felt he had not done anything wrong (T. 61-63).

According to Francois, Respondent Kellard then grabbed the door and pulled it open, before grabbing him by the back of his neck. Respondent Kellard climbed into the truck and stood to the left of the driver’s seat, next to Francois. Francois claimed that he tried to stand up in order to remove Respondent Kellard’s hand from his neck, but suddenly found himself on the floor, although he could not recall exactly how he came to be there (T. 63-67).

Francois further claimed that once he was on the floor, Respondent Kellard began punching him in the face. He testified that Respondent Kellard punched his forehead and the right side of his face at least four times, and slammed Francois’ head against the floor of the cab, near the pedals. Francois attempted to use his hands to cover his head, while lying on his stomach. He admitted that he made a fist in an attempt to block Respondent Kellard’s punches; according to Francois, Respondent Kellard was trying to put Francois’ hands behind his back at the same time. Francois testified that he eventually placed his hands behind his back after Respondent Kellard slammed his head on the floor three to four times (T. 67-70).

Francois observed that people in the vicinity had begun recording the incident with their cell phones during his altercation with Respondent Kellard. He denied knowing them or asking them to record. Francois further denied being in a position to strike Respondent Kellard with his arms or legs, because Respondent Kellard was crouched over his legs (T. 70, 72-73).

Francois testified that Respondent Kellard handcuffed him while he was still face down. He claimed that Respondent Kellard pulled him up by the handcuffs into a standing position, and then walked with him to the police vehicle. Francois admitted that as he was walking, he was

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also attempting to give his phone number to the bystanders so that they could send him the videos. Francois claimed that Respondent Kellard pushed him into the police vehicle, causing him to hit his head, before he could finish providing his number to the onlookers; because Respondent Kellard supposedly “threw” Francois into the RMP, he was initially lying face down before Respondent Kellard adjusted his body. Francois had no further communication with the bystanders (T. 74-78).

Francois testified that after being arrested, he was taken to the 49th Precinct, where he remained until the following afternoon. He did not recall whether he was offered medical attention at the precinct but conceded that he did not request it. When Francois was released, he returned to the scene of the incident to get the videos from persons who had been present on April 3rd, then went to the hospital. He claimed that he had been suffering from “intense headaches” and could not sleep (T. 78-80)

As a result of the incident, Francois sustained bruises and swelling on his head (T. 73, 80-82, 172). On April 4, 2017, Francois’ sister took photographs of his injuries (CCRB Ex. 2A-E). He described the five photographs as “the swelling of my face . . . the bruise and swelled ear . . . the scrapes on my knee, the bruise under my arm and . . . bruise on my face” (T. 80-81). Francois claimed that all the injuries depicted in the photographs were caused by the subject incident. He testified that he injured his face when his “head was slammed into the floor of the vehicle.” According to Francois, the injury to his left ear took over a month to heal; the injury to his right cheek took almost a year to heal (T. 82-83, 89-90, 99-102). Francois claimed that he filed a CCRB complaint about the incident because he was fired and thereafter unemployed for approximately two years; he further claimed that he continues to suffer psychologically from the incident (T. 205-206, 218).

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During the trial, Francois viewed several video recordings of the incident. Francois was shown CCRB Ex. 1A, between 12:35¹ and 13:25, and testified that it showed the police vehicles blocking traffic and his approach. Francois also viewed CCRB Ex. 1D² and testified that between 18:07 and 18:45, he is seen on the video wearing a brown UPS uniform. He first approaches the RMPs at 18:12 and, after a brief exchange, turns and begins walking back toward his truck approximately 28 seconds later at 18:40. During that time, Respondent Goode supposedly told him to “get the fuck out of here” and that she could give him a ticket, to which he replied that he would not “pay for that shit anyway.” He claimed that his voice was not raised when he replied to Respondent Goode (T. 116-117). From 13:37 to 14:15, CCRB Ex. 1A showed Respondent Kellard’s police vehicle moving ahead to allow traffic to move, then reversing at 14:34, which blocked Francois from driving forward in his UPS truck. Between 14:34 and 15:07, the recording shows Respondent Kellard emerging from his police vehicle and walking to Francois’ delivery truck (T. 112-116).

Francois viewed CCRB Ex. 1C and testified that the first 10 seconds depicted the moments after Respondent Kellard slammed his head into the floor and began handcuffing him (T. 103). Francois then viewed CCRB Ex. 1B and testified that the first 12 seconds showed him being thrown into the back seat of the police vehicle by Respondent Kellard; he also identified Respondent Goode on the recording, who appeared at the 00:24 mark (T. 110-112).

On cross-examination, Francois asserted that he regularly spoke to motorists about moving their cars as a means of saving time, because it was easier to transport packages in his truck rather than on foot; he characterized the typical tenor of such interactions as a calm request

¹ All time stamps referenced in this paragraph refer to the digital timestamps of the video files, rather than the security camera timestamps pictured in the videos.

² The trial transcript erroneously referred to this as Exhibit 1E.

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for a favor (T. 130, 134, 178-179, 201). He denied being upset during his interaction with Respondents, or asking, “I’m going to get an answer, or should I just get the fuck out of here and go fuck myself?” Francois claimed he was simply hoping to receive more information from Respondents so that he could resume his deliveries (T. 138, 183-184). Francois claimed that he was fired because of this incident and was unemployed for a time (T. 151-153).

Francois contended that he was unaware that Respondent Kellard’s hand had been injured when he closed the truck’s door, although he acknowledged learning later that Respondent Kellard suffered a “small, little injury” to his hand (T. 160-161). He conceded that while seated in the driver’s seat of the UPS truck, he was much higher than Respondent Kellard; he further admitted that he stood up when Respondent Kellard approached him. Francois agreed that Respondent Kellard did not choke him but asserted that Kellard did grab the back of his neck with a “tight grip” (T. 163). He initially claimed that he refused to show his license because he “didn’t break the law” but later conceded that he was parked unlawfully (T. 164-165). Francois denied ever kicking or hitting Respondent Kellard (T. 167).

He conceded that Respondent Goode did not walk toward his truck after he returned to it and that she was not involved with either removing him from the truck or placing him in the Respondent Kellard’s police vehicle (T. 195). Under questioning by the Tribunal, Francois acknowledged that carrying packages on foot might have been a more expedient way to make deliveries while waiting for the police vehicles to move (T. 220).

Respondent Kellard testified that on April 3, 2017, he was performing traffic enforcement duties in a marked police vehicle. Respondent Goode requested his presence over the radio at the scene of a car stop on Cruger Avenue and to bring summonses (T. 236-237). Upon his arrival, Respondent Kellard observed a car stop underway and pulled directly to the right of

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Respondent Goode's vehicle, thereby temporarily blocking traffic. As Respondent Kellard was assisting the operator of Respondent Goode's vehicle with the summonses, he observed Francois approaching from behind, walking directly between the two RMPs, which were only a foot apart at the time (T. 237-240).

Respondent Kellard testified that as Francois arrived, he asked, "What the fuck are you guys doing?" Respondents told Francois that there had been a traffic stop but Francois continued swearing, saying, "You need to get the fuck out of my way, I've got work to do." Respondents told Francois that he could be given a summons for leaving his vehicle parked and unattended in an unsafe location, and he answered, "Write me whatever the fuck you want. I'm not going to pay anyway" (T. 241-243). Francois kept arguing and cursing for a minute or so, refusing to leave. Respondent Kellard told him that he needed to move his truck because it was in an unsafe location and he began to walk away as bystanders began congregating. While walking away, Francois yelled, "These fucking cops think they can do whatever they want. We need them the fuck out of our neighborhoods" (T. 244).

Respondent Kellard testified that he drove forward to permit traffic to proceed and waited to see if Francois would try to move his vehicle. Because Francois never attempted to move his truck and remained standing outside his truck yelling, Respondent Kellard decided to issue him a summons (T. 244-245). Respondent Kellard then reversed behind Respondent Goode's vehicle for tactical reasons: the motorist whom they had stopped was "irate" and Respondent Kellard did not want the motorist positioned behind him (T. 245-246). Eventually, Respondent Kellard approached Francois, who was still standing and yelling near the passenger side of his truck. As Respondent Kellard drew closer to him, Francois entered the cab of the truck on the driver's side; Respondent Kellard followed to that side.

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Respondent Kellard asked for Francois' license and registration so that he could issue summonses for an unattended vehicle, double-parking, and disorderly conduct. He explained the reason for his demands, but Francois replied, "Fuck you, get away from me, I'm not giving you shit" (T. 246-247, 249-251). At that time, bystanders began gathering and Francois continued talking in a "loud and boisterous" manner. Respondent Kellard ultimately demanded that Francois exit the truck, but he kept refusing. Respondent Kellard claimed that he tried to deescalate the situation by asking for Francois' supervisor's name and contact information (T. 247-250).

Respondent Kellard began to reach inside the vehicle to grab Francois' wrist and "guide him out of the vehicle" but Francois pulled away, stood up and attempted to push the door closed. Respondent Kellard had to move his arm out of the way and used both hands to prevent the door from closing; despite doing so, his right hand was injured between the door and the door frame (T. 251-253). Respondent Kellard claimed that he was eventually able to force the door open, enter the truck and grab Francois, who was initially "kicking down" at Respondent Kellard. Respondent Kellard stumbled back briefly, and Francois put up his hands in a boxing pose and told Respondent Kellard, "Let's go, motherfucker" (T. 253). Respondent Kellard and Francois engaged in a physical confrontation in which Francois kicked, punched and flailed at Kellard; the struggle included wrestling on the floor of the truck (T. 252-254).

Respondent Kellard was eventually able to handcuff Francois and bring him to his police vehicle, although he was unable to specify how he was able to bring Francois under control. The crowd was yelling nicknames out to Francois, who tried to interact with them and pull away from Respondent Kellard. Francois went limp, so Respondent Kellard lifted him and dropped him into the seat of his vehicle (T. 254-256).

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Respondent Kellard testified that Francois was charged with assault on a police officer, among other charges (T. 256). Francois did not request medical attention during arrest processing at the precinct and refused offers to bring him to the hospital (T. 257). Respondent Kellard injured both hands because of the incident. His left hand suffered a contusion and bled; he required surgery for his right hand, which was broken and had a displaced bone (*Id.*).

On cross-examination, Respondent Kellard admitted that he weighed approximately 30 pounds more than Francois did and that he got Francois under control by himself, without assistance from any other MOS. He also agreed that he was the one to bring Francois back to the precinct and that he processed the arrest, including filling out all necessary forms, although he did not recall whether he did the TRI Report himself (T. 262-263).

While Respondent Kellard claimed that he issued the summonses on his own, after having his memory refreshed, he acknowledged that Respondent Goode “may have suggested it” (T. 305, 308-309). Regarding the portion of the video in which bystanders are shouting “fight back,” Respondent Kellard testified that he was attempting to place Francois inside his police vehicle, but he was pushing off the vehicle, resisting and going limp during that time (T. 336-337).

Respondent Goode testified that on April 3, 2017, she and her operator, Police Officer Santangelo, were in their police vehicle when another motorist cut them off. They stopped the motorist to issue summonses for traffic infractions; Respondent Goode asked Santangelo to contact Respondent Kellard to come to the scene and to bring extra summonses (T. 347-348). As she was giving instructions to Respondent Kellard and his partner, Francois walked between their vehicles from behind, in a blind spot, which Respondent Goode characterized as “very unsafe.” Francois was being “combative” and said that he wanted to know “what the fuck [was]

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going on.” He then walked away and mumbled something that Respondent Goode could not hear (T. 348-351).

Respondent Goode testified that she next saw Respondent Kellard drive forward to allow traffic to pass. She then turned her attention back to the original traffic stop, as the motorist was still quite agitated, and did not give Respondent Kellard any further instructions or orders (T. 351-352). Respondent Goode recalled that there came a time when she noticed Respondent Kellard exiting his RMP. A short time later, a civilian approached and told her, “There’s a fight down the block.” At that point, Respondent Goode saw Respondent Kellard bringing Francois to his police vehicle; Francois was resisting and refusing to go to the RMP on his own, and Respondent Kellard had to “drag him” (T. 353-354). She later learned that Respondent Kellard had been injured (T. 355).

On cross-examination, Respondent Goode explained that she paid attention to the original car as she was trained to do, because that car was in front of her, and that even though she was the only supervisor on the scene, it was not her primary responsibility to pay attention to Respondent Kellard’s actions (T. 361-363, 366). Respondent Kellard was approximately 40 to 50 feet away from her at the time of the arrest. Respondent Goode denied seeing any unreasonable use of force, but acknowledged that if she had seen such misconduct, she would have taken action (T. 368, 373).

CCRB entered into evidence Oscar Francois’ medical records (CCRB Ex. 3). There is a notation from April 4, 2017 that Francois was “allegedly ‘assaulted by a police officer’” and “complained of headache, stiff neck and swelling to forehead and left ear” (*Id.* at 3). A notation from April 13, 2017 states that Francois “was assaulted 2 weeks ago and pain to neck did not go away completely” (*Id.* at 11).

CCRB also entered into evidence two hearsay statements from Person A a bystander who witnessed the subject incident. Person A placed a call to IAB, which was recorded and transcribed. In that call, Person A told the investigator that she saw police telling a UPS truck driver to move because he was double-parked at the corner. She noticed a crowd forming around the truck, and screamed, “He’s beating him up!” Person A observed the driver on the floor of the truck. She approached other Members of Service and asked why the man was being beaten (CCRB Ex. 4A at 5-6). There is also evidence of a 911 call on April 3rd at 1824 hours in which Person A told the operator that an NYPD officer “beat up” a UPS driver (Ex. 5; Tr. 433).

A CCRB investigator then contacted Person A by telephone on April 20, 2017, and her conversation was recorded. In that call, she told the investigator that she saw the officer punching the driver, who was on the floor of the UPS truck, “like a punching bag” (CCRB Ex. 4B at 3). She claimed that once Francois was brought to the police vehicle, the officer continued beating him and slammed his head on the car door while placing him inside (*Id.* at 4-5).

Finally, Person A sent CCRB a notarized letter dated May 6, 2017, in which she wrote that she saw a UPS truck driver being slammed up and down by an “aggressive” police officer. Person A heard other bystanders becoming upset and she asked other MOS to intervene. In her estimation, she never observed the driver resisting arrest (CCRB Ex. 4C).

CCRB also introduced a hearsay statement from Person B another witness at the scene (CCRB Ex. 6). In a recorded telephone conversation on April 27, 2017, she told the investigator that she had seen a police officer “beating up” a UPS driver, and that bystanders ran to try to stop him. She stated that the officer was punching the driver in the face (*Id.* at 2-5).

In one of the video recordings entered into evidence, the voices of unidentified bystanders are captured. One bystander says, “They busted his head on the floor,” at the point

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when Francois is handcuffed and laying on the floor of the UPS truck (CCRB Ex. 1C at 00:18). Other bystanders can be heard shouting for Francois to “fight back” as he is being put in the police vehicle and appear to refer to him by the nickname “Maco” (phonetic) (*Id.* at 1:30-1:38).

In this case, the challenge facing the trier of fact is reconstructing the most probable nature of what occurred on Cruger Avenue on April 3, 2017, based on conflicting testimonial accounts. While the law creates the framework within which such a task is accomplished, the ultimate determination of which account to accept depends almost solely on an assessment of witness credibility. That assessment remains the exclusive province of the fact finder.

In this case, I credit, to a degree, the testimony of Oscar Francois. Francois was candid to the point of attesting to his own verbal confrontation with Respondents, including the use of profane language. Francois further admitted to leaving his work truck in the street unattended and illegally parked; approaching Respondents’ vehicles from behind; refusing to provide information or identification to Respondent Kellard; and attempting to close the truck door. I do not credit his characterization of the severity of his injuries, although I do find that he was injured during the arrest.

I credit Respondents’ testimony about the manner in which Francois approached them and the distraction he represented, particularly since their factual assertions on this issue were corroborated by Francois’ own account of the language he used, as well as by video evidence. I find Respondent Goode’s account credible with respect to her attention being focused on the original motorist at the time that Respondent Kellard walked toward Francois’ truck. Her testimony comports with common sense and her training to focus on the motorist whom she had originally stopped. Although she was the only supervisor on the scene, she was not Respondent Kellard’s supervisor *per se*. Finally, the video shows that she only came to Respondent

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Kellard's vehicle as Francois was being placed inside, which corroborates her testimony that she was not involved with Francois at that particular time.

Discourtesy

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondents were discourteous to Oscar Francois. The Patrol Guide requires MOS to interact with civilians in a courteous and professional manner. The credible evidence in the record establishes that Francois approached Respondents from a blind spot and that they used the word "fuck" when telling him to step away from them. I credit Francois' testimony about the use of profanity, as he testified credibly and candidly about his interactions with Respondents, including that he walked up between their vehicles. Generally, the Patrol Guide proscribes such an utterance. However, the analysis does not end with whether Respondents uttered the word; it is also necessary to consider the context. As Respondent Goode alluded to in her testimony, Francois emerged from a blind spot behind Respondents, who were in the process of issuing a summons to an "irate" motorist. This description is corroborated by Francois' own testimony that he walked between the police vehicles and approached from behind; CCRB Exhibit 1D captures this sequence of events as well.

I find that Respondents were placed in a tactically exposed position with an unidentified male suddenly appearing in a blind spot, and that this circumstance excuses their surprised—if profane—reaction. In the instant case, Francois approached Respondents from a blind spot while they were engaged with another subject and was verbally confrontational. Given the existence of one already displeased motorist, and the presence of numerous onlookers who offered commentary to the police presence, their reaction, while harsh, was likely intended to dispatch Francois so that they could refocus on the traffic stop. Based upon the foregoing, I find

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Respondent Goode Not Guilty of Specification 1 in Disciplinary Case No. 2017-18266; I further find Respondent Kellard Not Guilty of Specification 1 in Disciplinary Case No. 2017-18267.

Threat to Issue Summons

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent Goode abused her authority by threatening to issue Oscar Francois a summons. This tribunal has held recently that there is no actionable misconduct when a MOS informs a civilian that he can be issued a summons for illegal activity (*Disciplinary Case No. 2018-18541* [Nov. 22, 2019] [respondent not guilty for telling motorist that he would issue him a summons in the future if he caught him once again engaging in reckless driving]). Similarly, Respondent Goode did not abuse her authority by threatening to issue Francois a summons, because there was a legal basis to do so: he had left his vehicle unattended in the middle of the street. Therefore, I find Respondent Goode Not Guilty of Specification 2 in Disciplinary Case No. 2017-18266.

Wrongful Stop

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent Goode stopped Francois. Respondent Goode did not stop Francois herself, so the inquiry is whether she directed Respondent Kellard to do so. I credit Respondent Goode's testimony that she was deeply involved in the original traffic stop and was not paying attention to Francois at the time that Respondent Kellard went to stop him. Her credible assertion that she was focused on the original motorist makes it more likely than not that she did not give Respondent Kellard a directive with respect to Francois at that moment. Respondent Kellard's testimony was vague regarding whether Respondent Goode had ordered him to make the stop and does not constitute sufficient proof that Respondent Goode instructed

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him to do so. Francois asserted that he was approached by Respondent Kellard and made no mention of Respondent Goode. Finally, the video in CCRB Exhibit 1C only shows Respondent Goode arriving at Respondent Kellard's vehicle after he placed Francois inside. Accordingly, I find Respondent Goode Not Guilty of Specification 3 in Disciplinary Case No. 2017-18266.

Excessive Force

I find that CCRB has met its burden of proof by a preponderance of the evidence that Respondent Kellard used excessive force in punching Oscar Francois about the face. Pursuant to Patrol Guide Section 221-02, page 2, prohibition 11, a MOS must apply no more than reasonable force necessary to gain control. Under Patrol Guide Force Guidelines, force may be used when it is reasonable to ensure the safety of a MOS or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody. In all cases, any application of force must be reasonable under the circumstances.

In addition, MOS are required to prioritize de-escalation of force, where possible. In determining whether the use of force is reasonable in a particular case, MOS must consider the following factors:

- a. The nature and severity of the crime/circumstances
- b. Actions taken by the subject
- c. Duration of the action
- d. Immediacy of the perceived threat or harm to the subject, members of the service, and/or bystanders
- e. Whether the subject is actively resisting custody
- f. Whether the subject is attempting to evade arrest by flight
- g. Number of subjects in comparison to the number of MOS
- h. Size, age, and condition of the subject in comparison to the MOS
- i. Subject's violent history, if known
- j. Presence of hostile crowd or agitators
- k. Subject apparently under the influence of a stimulant/narcotic which would affect pain tolerance or increase the likelihood of violence.

(P.G. 221-01).

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Francois testified that Respondent Kellard punched him about the face approximately four times and slammed his head against the floor of his UPS delivery truck. I credit Francois' testimony as it pertains to being punched because he admitted initially resisting putting his hands behind his back so that he could protect his face and acknowledged that he had formed his hand into a fist to block the punches. Furthermore, Respondent Kellard did not deny that he threw punches and simply testified that he got Francois to the ground but could not remember what technique he had used. In light of this testimony, I find that Respondent Kellard did punch Francois in the face, while Francois was on the ground.

The inquiry then turns to whether Respondent Kellard's actions were a reasonable use of force, given the circumstances. I find that they were not.

The preponderance of the evidence supports a finding that when Respondent Kellard threw the punches, Francois was already on the ground of the UPS truck and no longer posed a threat to Respondent Kellard or to any third parties in the area (*See Disciplinary Case No. 2017-18154* [Apr. 21, 2020] [finding excessive force where respondent punched complainant, who was on the ground, despite complainant's "moving and twisting his body"]; *Disciplinary Case No. 2015-14379* [May 23, 2017] [finding excessive force where respondent punched an arrestee once while he was on the ground because he would not allow his right hand to be handcuffed]).

Respondent Kellard testified that he approached Francois' delivery truck in order to issue him summonses for traffic violations. While Francois was verbally confrontational, uncooperative and contumacious, Respondent Kellard's explanation for why he decided to issue those summonses is illogical and unsupported by the credible evidence in the case. I note that when Francois initially approached the officers, not even thirty seconds elapsed before he obeyed their orders and quickly walked back toward his truck, as depicted on CCRB Exs. 1A and 1D.

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Respondent Kellard testified that after blocking traffic with his police vehicle for a period of time, he moved the car to allow other motorists behind him to drive through the street. He then asserted that he waited for Francois to move his truck; when he did not, he drove his police car back into a blocking position and stepped out of it to issue Francois' summonses. I further find that while technically Francois may have been illegally parked, his presence in that position was largely due to Respondent Kellard blocking the street. His decision to allow other vehicles to pass, then to block Francois' UPS truck again, using the rationale of the need to issue a summons for illegal parking, seems so arbitrary as to be lacking in police necessity. As shown in CCRB Ex. 1A, Respondent Kellard drove his vehicle forward to permit stopped traffic behind him to pass through the street, then reversed to a position which effectively blocked Francois' truck again over a span of 38 seconds, which does not support his claim that Francois refused to move his truck when given the opportunity to do so.

I further decline to credit Respondent Kellard's testimony that Francois remained outside his truck shouting until Kellard began moving toward him. I instead credit Francois' testimony that he was seated in the driver's seat of the truck as more logical and plausible, as the interaction began because Francois was concerned about not being able to drive through the block undeterred so that he could expeditiously resume his UPS package deliveries.

In addition to the questionable motivation for the issuance of summonses to Francois, the gravity of his transgressions did not warrant the degree of force used and seemed punitive instead. Respondent Kellard was several inches taller and 30 pounds heavier than Francois. In addition, there were other MOS at the scene who were in a position to assist Respondent Kellard in effecting Francois' arrest. Francois was in an enclosed space (the UPS delivery truck) at the time of the confrontation with Respondent Kellard: he could not run while inside the truck and

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could not drive because he was on the floor. While Francois' actions in attempting to close the truck door, possibly causing injury to Respondent Kellard's hand, would provide an independent basis for placing him under arrest, such action under these particular circumstances would not warrant an increased quantum of force to effect that arrest.

Based upon the foregoing, I determine that Respondent Kellard's use of punches to Francois' face in affecting the arrest was excessive, and accordingly find him Guilty of Specification 2 in Disciplinary Case No. 2017-18267.

PENALTY

In order to determine an appropriate penalty, Respondent Kellard's service record was examined (*See Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 240 [1974]). Respondent Kellard was appointed to the Department on July 6, 2010. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent Kellard has been found guilty of excessive force. CCRB has requested the forfeiture of 20 penalty days. According to the NYPD Disciplinary System Guidelines for excessive, non-deadly force resulting in physical injury, the presumed penalty is 10 vacation days and 10 suspension days. The Guidelines define physical injury as "impairment of physical condition, and/or substantial protracted pain, including minor swelling, contusions, lacerations, and/or abrasions." Here, Francois suffered bruises to his face and body and headaches in the aftermath of the incident and that some of his injuries lasted months. Medical records also show that he was still complaining of pain weeks later. This penalty is also consistent with precedent. In a recently adjudicated case, a respondent forfeited 20 penalty days for punching and kicking

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an individual multiple times, including while he was on the ground (*Disciplinary Case No. 2017-18154* [Apr. 21, 2020]).

There is a potentially mitigating factor present: the injury Respondent Kellard suffered to his hand by the door Francois attempted to close; I find, however, that this factor does not outweigh an aggravating factor of an improper purpose to retaliate against Francois for being verbally confrontational. For these reasons, the presumptive penalty is appropriate.

Accordingly, pursuant to the disciplinary matrix and applicable precedent, I recommend that Respondent Kellard forfeit 10 vacation days and 10 suspension days to be served without pay.

Respectfully submitted,

Paul Gamble

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED
JUL 30 2021
Dermot Shea
DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANDREW KELLARD
TAX REGISTRY NO. 949158
DISCIPLINARY CASE NO. 2017-18267

Respondent was appointed to the Department on July 6, 2010. On his last three annual performance evaluations, Respondent twice received 4.5 overall ratings of "Extremely Competent/Highly Competent" for 2014 and 2016, and once received a 4.0 rating of "Highly Competent" for 2015. He has been awarded seven medals for Excellent Police Duty and five medals for Meritorious Police Duty.

In his ten years of service, [REDACTED]
[REDACTED]

Respondent has no disciplinary record.

For your consideration.

Paul Gamble
Paul M. Gamble

Assistant Deputy Commissioner Trials